No. 14,922

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON DUKE, PETER J. VALLENTINE, NELS PILSKOG, JOE MISZENCIN and THOMAS J. GOLDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLANTS.

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I.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska, Third Division, had jurisdiction of this matter by virtue of Title 28, Section 1346 (b).

The United States Court of Appeals for the Ninth Circuit has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U. S. C. A.,

June 25, 1948, c. 646, 62 Stat. 912; also, Section 8C of the Act of February 13, 1925, as amended (28 U. S. C. A. 1294). Practice in the District Court for the Territory of Alaska and appeals from the judgments rendered in said Court are all governed by the Federal Rules of Civil Procedure by virtue of 62 Stat. 445, U. S. C. A. 103A.

II.

STATEMENT OF THE CASE.

A. The Pleadings.

Plaintiffs' amended complaint filed against the United States of America, pursuant to the provisions of the Federal Tort Claims Act, charged the Alaska Railroad, an agency of the United States, with negligence in that prior to the 24th day of March, 1950, trained and instructed one Harold D. Greene in the duties of a gas car operator, pronounced and declared him qualified to act in said capacity and did on that date select and approve the said Harold D. Greene as competent and qualified to act as a gas car operator in the transportation of employees of Morrison-Knudsen Company, Peter D. Kiewit Company and S. Birch & Sons Company on and over the mainline tracks of the Alaska Railroad, and that having so examined, qualified and selected the said Harold D. Greene the Alaska Railroad delivered to the said Harold D. Greene certain rule books, timetables and other documents intended to control and limit his operation on the tracks of the Alaska Railroad as therein set forth,

and that while the said Harold D. Greene was engaged in operating the gas car on the tracks of the Alaska Railroad he was at all times acting under the direction and control of the Alaska Railroad and was required to perform his duties in accordance with the rules and regulations of the railroad. The amended complaint further alleges that while the said Harold D. Greene was engaged in operating the gas car and while transporting contractor's employees, he negligently ran his gas car with trailers attached head-on into and collided with a railroad train resulting in serious injuries to plaintiffs of such nature as to permanently affect their ability to earn a livelihood and by which reason they suffered great pain and inconvenience and were required to be hospitalized over a long period of time, for which they claimed damages in the respective amounts set forth in said amended complaint.

The United States answered and denied the negligence of any officers and employees of the Alaska Railroad and set up the defense that the acts of negligence were those of one Harold D. Greene, an employee of the construction company engaged in construction and rehabilitation work on the Alaska Railroad.

B. The Facts.

The Alaska Railroad, a common carrier by railroad of passengers and freight is owned and operated by the United States of America, by and through the Department of Interior. It traverses the area between Seward and Fairbanks, Alaska, a distance of approximately 500 miles. Its equipment, track facilities, and right-of-

way are owned by the United States and its employees are employees of the United States.

In 1949 the Alaska Railroad commenced to carry out a general construction and rehabilitation program, and pursuant to this program a contract was made with three general construction contractors, namely, Morrison-Knudsen, Peter D. Kiewit, and Birch Construction Companies, who contracted with the United States, as joint venturers, for certain construction and rehabilitation work between Anchorage and Portage, Alaska. (Defendant's Exhibit BB, Sup. Tr. 17.) (See defendant's Amended Answer para. IV.)

The contractor established a work camp at Rainbow Station for the housing and feeding of its construction workers and from that camp each day the workers, among whom were appellants, were transported to the work site at or near Indian Station approximately 5 miles south of Rainbow. The transportation of workers from camp site to work site was accomplished by the use of railroad motor cars to which were attached unpowered track cars designated as man-haul cars. The authority to operate motor cars and man-haul cars upon and over the tracks of the Alaska Railroad was made the subject of a special contract entered into between the Alaska Railroad and the Morrison-Knudsen Company, one of the joint venturers. This contract was introduced into evidence as plaintiffs' Exhibit 1 and the following provisions, among others, were included in the contract:

> "WHEREAS, it is the desire of the contractor to transport their employees and equipment by rail

motor car over the tracks of the Alaska Railroad in connection with the performance of railroad construction contracts;

1. The railroad hereby agrees to rent to the Contractor Rail Motor Cars and Push Cars when, if and as required by the Contractor and if available, for operation on the rail line of the Alaska Railroad at the following rates:

* * * * * * *

Beginning January 1, 1949, and to continue to December 31, 1951, unless sooner terminated on ten days notice in writing from either party or by mutual written consent of the parties hereto. Rental to be payable monthly.

* * * * * * *

3. The Railroad shall not be held liable to the Contractor for any loss or damage to property or for any personal injury either to the Contractor or his employees, or any other person, whether such loss or damage to property or personal injury arises from the construction or operation of its railroad or from any cause whatsoever.

4. For the purpose of operation of said Rail Motor Cars the Contractor will employ competent operators, whose selection shall be approved by the Railroad, in order that careful and competent operation will be assured.

5. The operators of said Rail Motor Cars must not operate them on or over the Railroad without first obtaining a lineup in order that danger of conflict with engines and trains may be avoided and the cars must be operated in strict conformity with railroad rules and regulations.

6. The Contractor will fully indemnify the Railroad in case of loss or damage to its property

through negligent operation of said Rail Motor Cars and will make good any charge or claim that may be allowed against said Railroad through personal or property injury resulting from the presence or operation of said Rail Motor Cars on the railroad tracks."

* * * * * * *

Witness John Manley, Assistant General Manager of the Alaska Railroad, identified the contract and testified that this contract was applicable to the project on which appellants were employed. (Tr. pp. 15 to 17.)

The contractor had designated one of its employees, Harold D. Greene, as the motor car operator and submitted his name to the railroad for approval as to his competency and qualifications. However, before he was permitted to operate a motor car on the tracks of the Alaska Railroad, he was brought to the offices of the railroad and given the regular examination required of all Alaska Railroad employees who operate mobile equipment on the tracks of the railroad. (Tr. pp. 34 to 37.) This examination was both written and oral, and the oral part consisted at least in part of the giving of operating instructions by the officials of the Alaska Railroad. (Tr. p. 122.) Following this examination and instruction, Greene was approved as a motor car operator and a certificate authorizing him to operate a motor car on the tracks of the Alaska Railroad was issued, bearing his name and signed by an official of the Alaska Railroad. There were also issued to him at the same time and for his guidance

and information certain official books of the Alaska Railroad, containing rules and regulations of said railroad, governing the operation of motor cars, but also containing other rules and regulations, involving railroad operations, movement of trains and the maintenance of way. These rule books were introduced into evidence as Plaintiffs' Exhibit No. 8, entitled "Manual of Safety Rules and Precautionary Measures for the General Guidance and Protection of Employees and the Public," Plaintiffs' Exhibit No. 10, entitled "Special Instruction No. 3," Plaintiffs' Exhibit No. 11, entitled "Transportation Rules and General Instructions." In addition to the foregoing, Greene was furnished with a timetable, Plaintiffs' Exhibit No. 3, which he was required to keep with him at all times, showing the movement of regularly scheduled trains on the tracks of the Alaska Railroad.

Amongst the rules promulgated by the Alaska Railroad in the manual, Plaintiffs' Exhibit No. 8, which Greene was required to adhere to in his operation of the motor car were the following:

> 209. The use of track cars for other than railroad business is prohibited, and no person shall ride on same unless required to do so in the line of duty.
>
> 212. No person shall operate a motor car without first having been examined on the rules, sight and hearing. He must carry a standard watch and be subject to timetable rules.
>
> Jacks and other tools and materials shall be carried on the sides and rear of car, never on front.
>
> 224. Operation of track cars on obscured curves, long trestles or in tunnels or snowsheds must be

properly protected by flags, unless the line is known to be clear of trains, and then must move at slow speed prepared to stop within ONE-HALF OF THE DISTANCE OF UNOBSTRUCTED VIEW.

227. Track cars must not be run at speed in excess of twenty-five (25) miles per hour. All track cars shall approach frogs, derails and switch points prepared to stop, and shall pass such movable parts when route is clear, at a speed not to exceed four (4) miles per hour.

231. Persons operating track cars are required to keep themselves informed as to train movements. The foreman or operator must watch closely for signals carried so as to know if additional sections are operating. Dispatchers will give lineup to foreman of gangs operating or handling track cars, when required. Persons receiving this lineup must understand that they are given this lineup as a matter of information only and that this lineup does not relieve them of full protection of their operations and responsibilities.

232. Operators of track and motor cars running over all or part of any subdivision must secure a lineup before leaving initial station on any subdivision. Lineups will, at the time of issue, indicate all trains or track cars except section track cars operated or scheduled to be operated at a later time on the subdivision. Operators of track motor cars must make their own arrangements regarding meeting opposing track motor cars.

235. In case initial station or terminal station is at a station that is not a telegraph station or at a telegraph station that is closed, the track motor

car operator will call the nearest open telegraph station or dispatcher and secure lineup and report his departure or arrival time.

In Plaintiffs' Exhibit No. 11, among other rules and regulations, are the following:

B. Employees whose duties are in any way affected by the time-table must have a copy of the current time-table in their possession.

C. Employees must pass the required examination.

M. They must expect trains to run at any time, on any track, in either direction.

The Alaska Railroad bound Greene to strict adherence to its rules and regulations, in his operation of the man train on the tracks of the Alaska Railroad, and put him under the absolute control of the Alaska Railroad *while he was so operating,* in exactly the same manner that it controlled its section foreman, gas car operators, maintenance of way employees, and all other employees who operated mobile equipment on the Alaska Railroad. (Tr. p. 88.)

Greene commenced his man haul operations on March 20, 1950, and according to the evidence, would start from Rainbow with a load of men at approximately 7:30 A.M., each morning and haul them to the job site near Indian, a distance of approximately 5 miles. The men would work there through the day until 5:00 P.M., with ½ hour for lunch. At or near 5:00 P.M., Greene would order the men to board the cars and proceed north to Rainbow. (Tr. p. 439.)

On March 24, 1950, Greene made his morning man haul from camp to project. At or about noon he came back to Rainbow and requested information as to the noon lineup from Foreman Bill Long. Long refused to give Greene the lineup because one of the section laborers, Hammerschild, had with Long's consent taken the lineup from the dispatcher and made an error in writing it down. (Sup. Tr. pp. 24 to 26, 33.) Ed Hamilton, roadmaster for the Alaska Railroad, who was present and apparently noticed that Greene was willing to take the lineup second hand, asked Greene if he was taking "these guys' " word for the lineup (Sup. Tr. p. 48), whereupon Greene said he would get it himself. (Sup. Tr. p. 27.) Long testified that Greene went to the telephone but that he (Long) did not know with whom he talked but thought it was the dispatcher (Sup. Tr. p. 38), and thought he wrote something down on paper. (Sup. Tr. pp. 23, 36.) Long further testified that he did not bother to get a correct lineup himself, because he did not intend to move on the tracks after lunch (Sup. Tr. p. 46.)

Later that same day at or near 3:30 P.M., Greene returned to Rainbow and came in the section house and asked Section Foreman Long if he had any more dope on the lineup, to which question Long stated that he did not. (Sup. Tr. p. 28.) Greene then went in the other room out of Long's sight and Long does not know whether he used the telephone or not, but *assumes* that he did. (Sup. Tr. p. 28.) Long stated that Greene waited for train No. 4 to go by and then said, "The railroad is mine," and took off to the south

toward Indian Station. (Sup. Tr. pp. 42, 43.) Long knew that Extra 562 South was coming from Anchorage and that the main line was not free of trains, but regardless of Greene's remark that the railroad was his, did not remind him of Extra 562 because he (Long), was not going to use the tracks, it was no concern of his. (Sup. Tr. p. 43.) Greene was, of course, heading for Indian to pick up the men and return them to Rainbow, and his remark about "the railroad is mine" could well have meant that the railroad was his with no train to be concerned with.

The testimony shows that Greene picked up approximately twenty men at the project at 5:00 P.M., and started north towards Rainbow, and on or at the point of a sharp curve at Mile 93.7 the main train ran head-on into passenger Extra 562 South.

The collision between the motor car and train resulted in the death of two men and serious injury to at least nine others. Greene, the operator, was not among the injured, he having jumped from the motor car at the first indication of impending danger.

Trial was had before the court and without a jury on the 21st day of January, 1953. Trial was completed, and the court taking the matter under advisement announced its decision several weeks later stating merely, "In cause No. A-7605 and A-7603, Dushon, et al, v. United States of America, I find the plaintiffs are not entitled to recover." No written opinion was ever filed wherein the court stated its reasons for holding the plaintiffs not entitled to recover.

On May 23, 1953, the trial judge died. At the time of his death no Findings of Fact and Conclusions of Law or Judgment had been prepared and entered, and after his appointment in November of 1953, the Honorable J. L. McCarrey, Jr., successor to the trial judge, based on stipulation of counsel, filed and entered Findings of Fact, Conclusions of Law, and Judgment, from which Judgment plaintiffs bring this appeal.

III.

QUESTIONS INVOLVED AND HOW RAISED.

The only question involved in this appeal is whether or not the injuries suffered by the plaintiffs, for which they seek damages against the United States, were caused by the negligence of any employee of the Government, as the term is used in New Title 28, U. S. Code, Chapter 85, Section 1346(b) and as defined in Chapter 171, Section 2671.

There is little if any dispute as to the facts of the case as shown by the evidence at the trial.

Rule 52 (b) of the Federal Rules of Civil Procedure contains the following provision:

> "When findings of fact are made in actions tried by the Court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment."

The question involved in this appeal is whether or not Harold D. Greene who was operating a track car with trailers connected was at the time of the collision acting in the capacity of an "employee of the government" as the term is used in Section 1346 (b) of New Title 28, U. S. Code and as the term is defined in Section 2671 thereof.

The question is raised on this appeal pursuant to the provisions of Rule 52 (b) above quoted.

IV.

SPECIFICATIONS OF ERROR.

No. 1.

Rule 18, paragraph 2(d) of the Rules of this Appellate Court contains the following provision:

> "In all cases, when Findings are specified as error, the specification shall state as particularly as may be wherein the Findings of Fact and Conclusions of Law are alleged to be erroneous."

Findings of Fact IX was in part as follows:

> "That track car operator Harold D. Greene, who was at the time an employee of an independent contractor and not of the defendant * * * ."
>
> * * * * * * *
>
> "* * * that it was not established that the Alaska Railroad or any employee or agent thereof was negligent."

The statements above quoted are alleged to be erroneous in that, at the time of the collision in which

plaintiffs were injured, Harold D. Greene was operating a track car on the main line of the Alaska Railroad and was operating under the direction and control of the Alaska Railroad and not of the independent contractor, and was in fact the employee of the Alaska Railroad, and in that the evidence did establish that Harold D. Greene, as such employee, was negligent.

No. 2.

The trial court's Conclusions of Law were as follows:

1. That the sole and proximate cause of the said collision and the injuries of the plaintiffs was the negligence of track car operator Harold D. Greene; that such negligence proximately causing the plaintiffs' injuries was that of an employee of an independent contractor and not of the defendant; that further said employee was employed by a government contractor within the meaning of the Federal Tort Claims Act and therefore not an "employee of the government" within the meaning of said act.

2. That the plaintiffs have not established, as required by the Federal Tort Claims Act, that their injuries were proximately caused by the negligence of a designated employee or any employee of the defendant.

These conclusions of law are alleged to be erroneous for the same reasons above set forth in Specification of Error No. 1 as to wherein Findings of Fact IX is erroneous.

V.

ARGUMENT.

In this argument Morrison-Knudsen, Inc., a corporation and its associates in the contract with the Government for the construction and rehabilitation work on the Alaska Railroad will be hereinafter referred to as Morrison-Knudsen.

It is alleged in the complaint and admitted in the answer in the action in which appeal has been taken from the Judgment, that the injuries suffered by the plaintiffs were the result of the negligence of one Harold D. Greene who at the time of the collision described in the complaint and in the Findings of Fact was operating a track car on the main line of the Alaska Railroad. It will be conceded by appellee that plaintiffs' injuries were so caused.

The question to be determined by this Appellate Court is whether or not the said Greene at the time of said collision was an employee of the Government in the sense that term is used in the Federal Tort Claims Act, New Title 28 U. S. Code, Chap. 85, Section 1346 (b), and defined in Section 2671 of said New Title 28.

In the latter section "employee of the Government" is defined as including officers or employees of any federal agency.

It will not be disputed that the Alaska Railroad is a federal agency as defined in Section 2671.

It is incumbent on the plaintiffs to demonstrate to this Appellate Court that Harold D. Greene was an

employee of the defendant, the United States, in operating the gas car at the time of the collision.

Morrison-Knudsen was a contractor with the United States. It is conceded that the general rule is that a contractee, in this case, the United States, is not liable for the torts or negligence of its contractor, in this case, Morrison-Knudsen, or its contractor's servants. This is true because an independent contractor, so long as he acts in that capacity is not the agent or servant of the contractee.

The application of this rule, however, admits of many exceptions and the facts present a situation clearly within several of these exceptions.

A controlling principle of law which applies to this situation is clearly stated in *Chicago B&I Railway Co. v. Willard,* 220 U.S. 413. Particular attention is called to pages 422-424 of the opinion in that case, including the following quoted with approval by Justice Harlan.

> "We think this court is committed to the view held by the current of authorities on this question, and, moreover, that, in sound reason and *as the better public policy* the doctrine should be maintained that the lessor company shall be required to answer for the consequence of the lessee company in the operation of the road, *not only to the public but also to servants of the lessee company who have been injured by actionable negligence of the lessee company.*"
>
> "Therefore it is, that though a railroad company may, *by lease or otherwise,* entrust the execution of its chartered powers and duties to a lessee

company, this court has expressed the view that the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, *is to be regarded as the servant or agent of the lessor company.*"

"The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own and operate a railway carries with it the duty to so use the property and manage and control the railroad as to do no unnecessary damage to the person or property of others; and where injuries result from the negligent or unlawful operation of the railroad whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable."

In the case on appeal the Alaska Railroad had the franchise and authorized and permitted Morrison-Knudsen to use its tracks and became liable in damages for injuries to third persons caused by the negligence of Morrison-Knudsen. Of course, Morrison-Knudsen could be negligent only through the actions of its officers, employees, or agents.

"All of the authorities hold that when a railroad company leases or contracts the use of its tracks to another and damages are suffered by third persons on account of actionable negligence on the part of either, both the lessor and lessee are liable for such damages."

Midland Valley R. Co. v. Toomer, 162 Pac. 1127-30.

Morrison-Knudsen was an independent contractor engaged in railroad construction operation. To facilitate railroad construction and rehabilitation Morrison-Knudsen was permitted by the Alaska Railroad to use its line and tracks. Under the principle announced in the foregoing decisions, and there are none to the contrary, the independent contractor rule would not apply to the use of the Alaska Railroad tracks by Morrison-Knudsen.

The Government could lease or license Morrison-Knudsen to operate track cars on its tracks but could not by such delegation of authority escape liability in damages for the torts of Morrison-Knudsen while so operating.

In such operation Morrison-Knudsen became the agent of the defendant and their employee in such operation, in this case Harold D. Greene, became the employee of the defendant, and the doctrine of *respondeat superior* applies.

> "Public policy requires that a corporation chartered to perform the public duties of a common carrier should not be permitted to contract with persons who may be irresponsible, for the performance of a part of its duties under its charters and thus avoid responsibility for the negligent performance thereof."
>
> *Liberty Highway Company v. Callahan,* 157 N.E. 708.

RIGHT OF CONTROL.

The master and servant relationship depends primarily upon the right of control.

35 Am. Jur. 445.

> "While it is said that in common law there are four elements which are considered upon the question whether the relationship of master and servant exists—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power or control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work is to be done * * *".
>
> *Matcovich v. Anglim,* 134 Fed. (2d) 834.

In support of this principle appellants cite also *Denton v. Yazoo & M. V. R. Co. et al.,* 284 U.S. 305, as follows:

> "Question whether work which servant was doing when injuring third person was work of one person or of another may usually be determined by ascertaining under whose authority and command work was being done.
>
> "When one person puts his servant at disposal and under control of another to perform a particular service for latter, servant, respecting acts in such service, should be dealt with as latter's servant." (Syllabus.)

We quote also the following from *State of Maryland v. Manor Real Estate and Trust Co. et al.,* 176 Fed. (2d) 414, Opinion 8.

> "The defendant also contends that it is relieved from liability under the Federal Tort Claims Act, 28 U. S. C. A. Para. 1314 (b) because the jurisdiction of the District Courts to entertain actions on claims against the United States for injury to property of persons is limited by the statute to negligent or wrongful acts or omissions of any employee of the government acting within the scope of his employment, and an employee is defined in 28 U. S. C. A. 2671 as a person acting on behalf of the federal agency in an official capacity. It is said that Dugan was in complete charge of the management of the property as an independent contractor and hence Anderson's death was not caused by the negligent act or omission of any employee of the government. There is no substance in this connection because the evidence shows that Dugan was subject to the detailed supervision of the Public Housing Authority, and that in his contract for the management of the property he agreed to be bound by the regulations issued by the government in the form of a contract manager's manual, and by all amendments thereto."

In this case Greene was in the general employment of Morrison-Knudsen for purposes connected with the work being done for the Government and in connection with his employment used and operated a gas car on the defendant's railroad tracks. He was subject to the orders of Morrison-Knudsen as to where to go for the purpose of hauling men and supplies and with

respect to all duties which he was employed to perform. Morrison-Knudsen could instruct him, for instance, to proceed with his track car to Anchorage for the purpose of picking up laborers, machinery or anything needed by it in its construction operation.

But, from the moment Greene started to operate the track car on the Alaska Railroad he was subject to the direct control of the Alaska Railroad with respect to operating the car.

In *Standard Oil Co. v. Parkinson,* 152 F. 681, 682, the late Judge Walter H. Sanborn laid down a test for the application of the rule, *respondeat superior,* which is an aid to clear thinking in a case such as this. He said:

> "The test of liability for the act or omission of an alleged servant is his right and power to direct and control his agent in the performance of the actual act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maxim 'Respondeat Superior', in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond."
>
> *P. F. Collier & Son Distributing Corp. v. Drinkwater,* 81 F. (2d), p. 202, Opinion (2).

> "The relationship of master and servant exists where the employer has the right to direct and control the method and manner in which the work is to be done and the result to be accomplished, while an independent contractor is one engaged to

perform service for another according to his own method and manner freely from direction and control of the employer in all matters relating to the performance of the work, except as the result of the product. The line of separation between the two is the degree of direction and control. In the former, the result produced; in the latter direction and control are limited to the result and do not apply to the method and manner of the service rendered."

Jones v. Goodson, 121 F. (2d), 179, Opinion (2).

Applying the principles of law stated in the foregoing decisions we have this situation: Greene was employed by Morrison-Knudsen, et al., contractors, to operate his gas car over the tracks of the defendant in transporting their employees to and from work, at certain hours of the day. He was under the control of the contractors as to the result to be accomplished. As to the operation of the gas car in that transportation he was under the absolute control of the defendant. He was selected with the approval of the defendant after being examined and qualified by the defendant. The examination was partly educational. The witness Manley testified that when his answers were hazy, the rules were explained to him. He was equipped with copies of defendant's rules, regulations and time-tables. He was on June 6th, 1949, issued a certificate of qualification. He accepted the employment under the conditions imposed by defendant's rules and regulations. He was bound not to exceed a prescribed speed —to use flags when necessary and advisable, and above all never to proceed upon the tracks unless he knew

they were clear. As to all these details of operation the defendant had absolute right of control and the contractors no control whatsoever—

Greene's violation of the rules did not relieve the defendant from liability.

Linman v. Murphy, 232 S.W. (2d) 937.

Furthermore, in the operation of the gas car Greene was engaged in the business of the defendant. It may be that in a sense it was the business of Morrison-Knudsen to arrange for the transportation of their men, from the camp where they lived to the job-site where employed, and return—but all transportation over the tracks of the defendant was the business of the defendant, which as has been demonstrated could not be delegated so as to relieve the defendant of responsibility.

See also:

American Pacific Whaling Co. v. Kristensen, 93 F. (2d) 20 (9th Cir.);

International Great Northern R. Co. v. Lucas, 70 S.W. (2d) 226.

"Work of handling mail, done by men furnished by railroads under postal regulations held governmental work, relieve railroads from liability for injury to railway postal clerks."

Denton v. Yazoo & M. V. R. Co., et al., 284 U.S. 305;

Doll & Sons v. Rebetti, 203 F. 593;

State of Maryland v. Manor Real Estate & Trust Co. (Tort Claims Act) 176 Fed. Rep. (2d) 419.

According to all the authorities heretofore cited and none can be cited to the contrary, the defendant was charged with the absolute duty of the safe operation of the Alaska Railroad and all operations on its tracks.

Greene was employed by Morrison-Knudsen contractors to operate gas cars over the tracks of the defendant in transporting their employees to and from work, at certain hours of the day. He was under the control of the contractors as to the result to be accomplished. As to the operation of the gas car in that transportation he was under the absolute control of the defendant. He was selected by Morrison-Knudsen with the approval of the defendant after being examined and qualified by the defendant. This selection was pursuant to a written contract between the Alaska Railroad and Morrison-Knudsen entered into on January 1, 1949. This contract was admitted in evidence and marked plaintiffs' Exhibit No. 1 (See Tr. Vol. I, P. 15).

Pertinent parts of this contract follow:

> "MEMORANDUM OF AGREEMENT entered into by and between The Alaska Railroad, hereinafter called the 'Railroad', and the Morrison-Knudsen Company, Inc., of Anchorage, Alaska, hereinafter called the 'Contractor', WITNESSETH that:
>
> WHEREAS, it is the desire of the Contractor to transport their employees and equipment by rail motor car over the tracks of the Alaska Railroad in connection with the performance of Railroad construction contracts; and

WHEREAS, the Railroad has certain equipment available for such transportation of employees and equipment.

IT IS HEREBY UNDERSTOOD AND AGREED by and between the parties hereto as follows:

1. The Railroad hereby agrees to rent to the Contractor Rail Motor Cars and Push Cars when, if and as required by the Contractor and if available, for operation on the rail line of the Alaska Railroad at the following rates:

Rail Motor Cars	Each $1.00 per calendar day
Push Cars	Each $0.25 per calendar day

* * * * * * *

3. The Railroad shall not be held liable to the Contractor for any loss or damage to property or from any personal injury either to the Contractor or his employees, or any other person, whether such loss or damage to property or personal injury arises from the construction or operation of its railroad or from any cause whatsoever.

4. For the purpose of operation of said Rail Motor Cars the Contractor will employ competent operators, whose selection shall be approved by the Railroad, in order that careful and competent operation will be assured.

5. The operators of said Rail Motor Cars must not operate them on or over the Railroad without first obtaining a lineup in order that danger of conflict with engines and trains may be avoided and the cars must be operated in strict conformity with railroad rules and regulations.

6. The Contractor will fully indemnify the Railroad in case of loss or damage to its property

> through negligent operation of said Rail Motor Cars *and will make good any charge or claim that may be allowed against said Railroad through personal or property injury resulting from the presence or operation of said Railroad Motor Cars on the railroad tracks.*" (Italics ours)

Particular attention is called to the italicized portion of the preceding paragraph. It is perfectly evident that the Alaska Railroad attorneys recognized the general law that when they permitted another concern to use their cars and tracks for construction purposes they were liable in damages to any persons injured on account of the operation of said railroad motor cars on the Alaska Railroad tracks, and therefore caused to be inserted in the contract the above indemnity provision.

The testimony in this case shows that one George Leedy was one of the attorneys for the defendant. Leedy was also the Seattle attorney for Morrison-Knudsen by an arrangement with the Assistant District Attorney, Arthur D. Talbot. Leedy was associated as attorney for the defendant in the trial of the case. He took a prominent part in the trial and frequently took exception to the admission of evidence on the ground that it was not binding upon his client Morrison-Knudsen, in order that should the case terminate in a judgment for plaintiffs it would be clear that the judgment was in res adjudicata as to Morrison-Knudsen.

John E. Manley was the Assistant Manager of the Alaska Railroad and at the time of the accident and prior thereto and for a long time afterwards was the

Acting Manager of the Alaska Railroad. Transcript, Page 5. Manley, his attention having been called to paragraph number 1 in the contract, plaintiffs' Exhibit No. 1, on direct examination, questioned by Mr. Grigsby, testified as follows:

"Q. Was that agreement carried out, to your knowledge—were the motor cars and push cars rented to Morrison-Knudsen and associates under that agreement?

A. I know there were motor cars rented I am not sure about the push cars.

Q. Do you know who owned the motor car—the motor car operated by Harold D. Greene on the date of the accident?

A. I think our records will indicate that it was owned by the Alaska Railroad.

Q. Do you know that it was leased under this agreement?

A. Yes sir.

* * * * * * *

Q. Now I will call your attention to the paragraph which states 'for the purpose of operation of certain rail motor cars the contractor will employ competent operators whose selection will be approved by the Railroad in order that careful and competent operation will be assured'. Now in your capacity as Assistant Manager, how long have you been Assistant Manager Mr. Manley?

A. Since approximately July of 1949.

* * * * * * *

Q. Do you know that Harold D. Greene was occupied as a motor car operator on March 24, 1950?

A. On that particular day he was operating a motor car.

Q. He was; and do you know whether his selection for operating that car was approved by the railroad?

A. He was approved by our Rules Examiner.

Q. He was approved; and was he issued a certificate which qualified him to operate a motor car generally or for Morrison-Knudsen Company, or anybody else—a certificate authorizing him to operate motor cars on your railroad?

A. Our records show he was.

Q. Have you a copy of that record or of the certificate issued to him?

A. No sir.

Q. Have you a record showing it was issued to him?

A. Yes sir.

Q. Do the records show that he was issued Alaska Railroad certificate No. 1036?"

At this point Mr. Talbot offered to stipulate that the records so showed.

By Mr. Grigsby:

"Q. This says he was examined for the purpose of obtaining a certificate, is that right Mr. Talbot?

A. Yes, but to the best of my knowledge no copies were made of that certificate—the original only, and Greene has it.

* * * * * * *

Q. Then his employment on the Turnagain Arm Project in March, 1950 was approved and authorized by the Alaska Railroad?

A. He was qualified as a gas car operator, the capacity for which Morrison-Knudsen hired him I have no way of knowing.

Q. Well, the selection by them was approved by the Railroad—you did pass him as qualified to operate motor cars for Morrison-Knudsen on the railroad if they wanted to select him for that? Right?

A. Right?

Q. Now Mr. Manley, as a gas car operator in the employ—as a general employee of Morrison-Knudsen and having been examined by you and qualified for that purpose was he subject to the rules and regulations of the Alaska Railroad?

A. He was subject to the same rules and regulations as pertained to gas car operators — as Alaska Railroad gas car operators.

* * * * * * *

Q. And was he subject to the rules that pertained to gas car operators with regard to obtaining lineups?

A. He was.

Q. And was he subject to the regulations as to operating a gas car over the railroad without first obtaining a lineup—to follow the regulations?

A. He was subject to the gas car regulations the same as the Alaska Railroad employees operating a gas car—only insofar as gas car operators are concerned."

(Pages 16-24, TR)

The franchise of the Alaska Railroad is the Alaska Railroad Act, A.C.L. Annot. 1949, Vol. II, Sec. 4931.

By the terms of this act the President of the United States is empowered, authorized and directed, among other things, "to designate and cause to be located a route or routes for a line or lines of railroad in the

Territory of Alaska not to exceed in the aggregate 1000 miles and to construct and build a railroad or railroads as he may so designate and locate and operate the same." This Railroad Act was mandatory. Under its provisions it became not only the right but the duty of the United States to build and operate a railroad. This right and duty is according to all the authorities non-delegable. That is to say, the owner of the franchise, that is the United States, while it is empowered by the Railroad Act to lease the said railroad or railroads or any portion thereof, cannot according to the unanimous authorities thereby escape liability for damages suffered by third persons. Likewise as the authorities heretofore cited hold, and no authority can be found to the contrary, no railroad company can license or permit the use of its equipment and/or railroad lines by another corporation, or concern or individual, and escape liability. The testimony in this case, and this will be conceded, shows that Harold D. Greene carried with him the rules and regulations of the Alaska Railroad. That he was bound by the instructions contained therein and having been selected by Morrison-Knudsen Company as a gas car operator and having been examined by the Alaska Railroad and his selection approved he was under the direction and control of the Alaska Railroad management at all times while operating a motor or gas car.

It was Greene's duty to operate according to the terms of the contract, plaintiffs' Exhibit No. 1, pursuant to which he was authorized to operate, at all times subject to the direction and control of the Alaska

Railroad and unhampered by any directions of Morrison-Knudsen. Fortuitously and unfortunately the collision occurred while the motor car operated by Greene was rounding a very sharp curve. At that time Morrison-Knudsen was engaged in the construction of a railroad track which, when completed, would eliminate and eventually did eliminate dangerous curves on the railroad line, including the curve where the collision happened. There were many dangerous curves between the job site where the plaintiffs were employed and the camp where they lived as well as some stretches of railroad without curves. The evidence in the case shows that the fireman of Train 562 South first sighted Greene's car when it was about seventy-five feet distant. Although the brakes were applied immediately both on the 562 engine and on Greene's motor car the collision could not be prevented. It was Greene's duty under the railroad rules and regulations, which he carried with him at all times, before rounding the curve to send ahead a flagman for the protection of both an oncoming train and his motor car and the passengers thereon. It was Greene's duty to have positively known the track was clear before he rounded the curve. As said before, the pleadings admit and the findings of fact state that Greene had knowledge that train No. 562 South was in the vicinity.

The Tort Claims Act was passed for the purpose of enabling all persons who suffer injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his

office or employment, to recover damages for such injuries, loss of property, or personal injury or death

Under the terms of the Act the negligent or wrongful Act or omission must have been caused by an "employee of the government" as defined in Section 2671.

It may be true, as no doubt will be contended by the attorneys for the United States in their brief that the Federal Tort Claims Act should be strictly construed as against the claimant. If that is the law it will be the duty of the attorneys for the government to rely on that principle.

But this does not mean that it will be their duty to advance far-fetched technicalities in their argument.

The primary purpose of the Act was to do justice to claimants.

The attorneys for the government will concede that a master or employer is responsible for the wrongful acts of his servant or employee committed within the scope of his employment.

They will undoubtedly insist, however, that an "employee of the government" means an employee hired and paid by the government and as to whom the government may exercise the right of discharge.

The Tort Claims Act however, does not so define "employee of the government". It does not define the term at all except to state in Section 2671 that it includes employees of any federal agency. The term

"employee" is nowhere defined by any Act of Congress.

We must look to the common law and the decisions of the courts for a definition and according to *Matcovich v. Anglim,* 134 Fed. (2d) 834 (9th Cir.):

> "While the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servants' conduct are to be considered—the really essential element of the relationship is the right of control."

Morrison-Knudsen had the right of control of Harold D. Greene in respect to his general duties. They had the right to discharge, they had the right to use him as a gas car operator subject to the approval of the Alaska Railroad, and the Alaska Railroad did approve his selection. Morrison-Knudsen had all rights to direct Greene where to go with the gas car, when to go, and for what purpose at all times subject to the Rules and Regulations of the Alaska Railroad, but according to all authorities they had no right to direct or instruct him as to how to operate the car. That power could not be delegated and as stated before the authorities are unanimous and there are none to the contrary that a permittee using the tracks and/or equipment on a railroad while transporting persons or equipment becomes the employee of the railroad.

However, while the Government did not have the power to discharge Greene from the general employment of Morrison-Knudsen they did have the right to

discharge Greene as a track car operator on thei tracks. In fact the Alaska Railroad did exercise tha power on April 3rd, ten days after the collision. John E. Manley, the Acting Manager of the Alaska Rail road, wrote a letter directed to Morrison-Knudsen Co at Anchorage, Alaska. This letter was written after an investigation by the Alaska Railroad as to the cause o the collision in which plaintiffs were injured. In thi letter Manley stated, referring to Passenger No. 56 South:

> "A thorough check of our records show that thi train was indicated on both the 7 A.M. and noo lineup of March 24, 1950. Accordingly, we have n alternative but to disqualify Mr. Greene as a ga car operator and he will not be permitted to oper ate a gas car on the Alaska Railroad in the future We regret the necessity for this action."

This letter was offered in evidence by the defendant admitted without objection by the plaintiffs an marked Defendant's Exhibit "A". (TR. 127.)

VI.

CONCLUSION.

Appellants contend that it has been conclusively established by the authorities cited in this brief that:

1. At the time of the collision Harold D. Greene was an employee of the Alaska Railroad in the sense that term is used in the Federal Tort Claims Act.

2. It is conceded by the attorneys for appellee and o found in the Findings of Fact and Conclusions of Law that the injuries suffered by plaintiffs were the esult of the negligence of Harold D. Greene.

3. The Alaska Railroad investigated the cause of he collision and found that it was caused by the egligence of Greene and revoked the permission heretofore given to Morrison-Knudsen to use Greene s an operator of a gas car on their tracks.

The testimony in this case reveals that Harold D. reene was so grossly negligent that were the defend- nt a private corporation punitive damages could be ecovered. Under Section 2674, New Title U. S. Code, he United States is not liable for punitive damages.

However, if this Appellate Court decides that this ppeal should result in a reversal the amount of dam- ges to be recovered will be for the Trial Court to ecide.

Seven plaintiffs sued for damages aggregating 1,500,000.00. The amount of recovery will depend rgely upon the testimony of doctors and surgeons. he amount sued for averages about $200,000.00 per laintiff. This amount is not so large as to shock the onscience. Judgments for amounts in excess of $200,- 00.00 for total disability have frequently been sus- ained by the courts. The total disability of a laborer as been held to mean his total inability to earn his ving by labor. No amount of money can compensate man who has been rendered a cripple for life by the egligent act of another. Judgments for damages are

rendered in order to make his life more endurabl rather than as compensation. The judgment of th Trial Court should be reversed.

Dated, Anchorage, Alaska,
January 2, 1957.

Respectfully submitted,
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